Supreme Court, U. S.
FILED
JUL 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1678

FEDERAL POWER COMMISSION,
Petitioner,

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. A to Petition for Writ of Certiorari) is reported at 522 F.2d 1345. One Federal Power Commission order from which review is sought (Petition, App. D) is reported at 52 F.P.C. 989. The other order (Petition, App. F) is as yet unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the FPC's curtailment jurisdiction extends to consideration of a petition for extraordinary relief requesting the establishment of a compensation program.

STATUTES INVOLVED

In addition to those parts set out in the Petition, the Natural Gas Act, June 21, 1938, c. 566, 52 Stat. 821-833, as amended, 15 U.S.C. §§717-717w, provides:

Section 16

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in

convenient form for public inspection and examination during reasonable business hours.

STATEMENT

Mississippi Public Service Commission regards the statement of the Federal Power Commission as providing an adequate description of the proceedings for the purpose of determining whether to grant the Petition.

ARGUMENT

1. There are no urgent reasons dictating this Court's review since the court of appeals decided a jurisdictional issue without immediate widespread impact on the Federal Power Commission's administration of the Natural Gas Act. The court did not hold that, under the Act, the FPC was required to impose a compensation program as part of every pipeline's curtailment program. Furthermore, the court's decision will not require a general restructuring of pipeline rates for the sale of gas.

In concluding that there is no jurisdictional bar to a compensation program, the court intimated no view on the merits of compensation programs in general. The court properly never reached such broad questions. The court addressed one narrow threshold issue: whether the FPC had jurisdiction to grant MPSC's request for extraordinary relief in the form of compensation.[1] The court concluded that the

[1] At the FPC, the Commission denied on jurisdictional grounds, without formal hearing, MPSC's petition for extraordinary relief from a Commission-approved curtailment program for United Gas Pipe Line Company's system, holding it was without statutory authority to grant the relief.

FPC did. In holding that the FPC must consider whether compensation payments are necessary to insure the justness and reasonableness of a particular curtailment plan, the court mandated further proceedings at the FPC on MPSC's petition. Nothing more. The court decided a jurisdictional issue, not the compensation issue.

The court left the FPC free on remand to include *or not include* a compensation program as part of United's curtailment plan. The court went out of its way to insure that the FPC's reconsideration of MPSC's petition would be unfettered.[2]

Under the circumstances, considerations of judicial economy favor denial of the writ. No opportunity is presented by this case to review issues, other than the limited jurisdictional one, that converge about compensation proposals.

2. The court of appeals correctly determined that FPC curtailment jurisdiction extends to consideration of MPSC's petition for relief. The court's conclusion is squarely supported by decisional law.

The FPC had denied MPSC's petition because it lacked the jurisdiction to grant the requested relief. The court of appeals reviewed the jurisdictional question in two steps. First, the court assured itself that the FPC had statutory

[2] "*We do not reach the merits*, preferring to allow the Commission to reconsider the matter in light of our holding that jurisdiction exists. Moreover, any consideration on the merits in this court must be on the basis of findings made by the Commission on an adequate record." (Petition, App. A, p. 7a) (Emphasis supplied)

"*Whatever the result on remand*, the Commission should make findings supported by an adequate record, *relating to the inclusion or the failure to include compensation* as a part of a curtailment plan." (*Ibid.*, p. 12a) (Emphasis supplied)

authority to impose a system of compensation payments. The court relied on *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) and held that the FPC "is vested with both jurisdiction and broad power to solve the problems caused by curtailment." (Petition, App. A, p. 9a) Since certain economic consequences flow from the allocation of gas supply, the FPC's authority for the imposition of compensation charges would flow then from the same source as its curtailment authority, namely Section 1(b) of the Natural Gas Act. "Thus, the basis for the imposition of such charges is not the rate setting jurisdiction of the Commission but rather is the transportation jurisdiction of the Commission." (*id.*) Furthermore, Section 1(b) did not preclude FPC jurisdiction over compensation.[3]

Secondly, the court turned to the FPC's argument that the unlawful effects of compensation programs precluded their imposition. The court reviewed the barriers posed by the FPC to compensation. The court recognized that the core of the jurisdictional question was the character of compensation payments.[4] If compensation payments were rates, this would impermissibly involve the FPC in ratemaking for non-jurisdictional customers. The court concluded compensation payments were not rates "but in the nature of surcharges imposed in the context of a curtailment plan to insure that the

[3] The FPC's interpretation of its authority would create that "no-man's land" between federal and state regulation abjured by this Court. *FPC* v. *Transcontinental Gas Pipe Line Co.*, 365 U.S. 1, 19 (1961).

[4] "[C]haracterizing the compensation payment as either a rate in itself or a change in the rates of a natural gas company, the Commission necessarily sets up a jurisdictional barrier to compensation." (Petition, App. A, p. 10a)

burdens of curtailment are spread evenly and equitably among those affected by such plans." (id.)[5]

The petition for writ of certiorari dismisses the court's reasoning as merely substituting labels and disregarding the effect and nature of compensation payments (Petition, p. 11). But in distinguishing compensation payments and rates, the court is not characterizing for the purpose of reaching a desired result. Rather, the court's semantic distinction reflects real differences.

The Commission, in an expansive gloss on "rates" attempted to include under that umbrella payments which clearly do not fit any reasonable view of pipeline rates. Compensation payments are not rates under the Natural Gas Act because payments are not made to the pipeline. It is highly significant that no funds collected for compensation accrue to the pipelines.[6]

3. This Court has responded in two recent cases to FPC denials of jurisdiction. In both instances, the Court took exception to the FPC's narrow construction of its authority.

[5]The court analogized compensation payments to penalty provisions included by the FPC in curtailment plans to deal with the problems of overtakes (*id.*, p. 10a-11a). Petitioner misses the boat in arguing that penalty provisions actually support the FPC's position on compensation (Petition, p. 12-13). The point is not that penalty provisions are filed as part of a curtailment tariff and evaluated under the standard of Section 4 of the Act. The point, rather, is that these provisions apply *both to jurisdictional and non-jurisdictional customers*, that they are not rate-setting forbidden by Section 1(b), but simply collateral aspects, like compensation, of curtailment plans.

[6]Section 4(a) provides: "[a]*ll rates and charges made, demanded or received by a natural gas company* for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission shall be just and reasonable. (Emphasis supplied)

In *NAACP* v. *FPC*,[7] the Court endorsed a broad view of FPC jurisdiction. The NAACP and others had petitioned the FPC to issue a rule requiring equal employment opportunity and non-discrimination in the employment practices of regulated companies. The FPC denied the petition, arguing that it lacked jurisdiction to adopt the proposed rule. The court of appeals, however, held that the FPC did have the power to consider evidence of discrimination by regulated utilities in performance of its regulatory function. This Court agreed that the FPC was authorized to consider the consequences of discriminatory employment practices by regulated companies insofar as the consequences were directly related to the FPC's establishment of just and reasonable rates.

This Court in *Conway Corp.* v. *FPC*[8] rejected the FPC's argument that it did not have jurisdiction to consider allegations that a company's jurisdictional wholesale rates were discriminatory and noncompetitive in relation to its non-jurisdictional retail rates. The FPC had denied a request by a wholesale customer seeking to introduce evidence of anti-competitive activities, contending that since its authority was limited to wholesale rates, relief for anti-competitive effects would be beyond its authority. The Court was not persuaded.

> The Commission thus cannot so easily satisfy its obligation to eliminate unreasonable discriminations or put aside its duty to consider whether a proposed rate will have anti-competitive effects.

Both decisions require that the FPC, in exercising its statutory responsibilities, take a broader view of its jurisdiction than reflected in its denial of MPSC's petition.

[7]____ U.S. ____, 44 U.S.L.W. 4659 (U.S. May 19, 1976)

[8]____ U.S. ____, 44 U.S.L.W. 4777 (U.S. June 7, 1976)

Louisiana Power & Light Co. v. *FPC, supra*, strongly suggests that the FPC's restricted concept of curtailment jurisdiction in this case is in error.

4. Compensation payments are not sales of natural gas for resale in interstate commerce. The FPC was plainly wrong when it said that elements of a sale are present in the payment of compensation. A sale requires a willing seller and buyer as well as the transfer of title and possession of property. Under a curtailment plan with compensation provisions, there is no transfer of gas nor of the title to gas because compensated customers never possess title to the gas for which they are compensated. Consequently, there would be no jurisdictional transaction.

Further, there is no record support for the argument that compensation programs would result in pipeline rates that violated Section 4(b) of the Act, nor that compensation programs would defeat the objectives of end use curtailment. Such issues plainly require an evidentiary hearing before such determination can be made.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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